> [The Declaratory Judgment Act], while allowing prospective defendants to sue to establish their nonliability, specifically preserves the right to jury trial for both parties. It follows that if Beacon would have been entitled to a jury trial in a treble damage suit against Fox, it cannot be deprived of that right merely because Fox took advantage of the availability of declaratory relief to sue Beacon first. 359 U. S. at 504.

Mr. Justice Stewart emphasized the corollary of the above proposition, viz., that if the basic issues in an action for declaratory relief are of a kind traditionally cognizable in equity, then the issues are properly triable by the court.[9]

That the basic nature of the issues presented—whether legal or equitable—controls the question of the right to jury trial, and not the fact that the action is cast in the form of a declaratory judgment action, was reemphasized by the *per curiam* opinion in *Simler* v. *Conner*, 372 U. S. 221. There the Court said:

> The fact that the action is in *form* a declaratory judgment case should not obscure the essentially legal nature of the action. The questions involved are traditional common law issues (372 U. S. at 223) (emphasis supplied).

In short, in this suit for an injunction the issues are purely equitable. These issues become no less equitable by being cast also in the mold of a declaration of rights.[10] To hold otherwise would be to exalt form over substance.

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[9] 359 U. S. at 515.

[10] See *Snubin* v. *United States District Court*, 313 F. 2d 250 (9th Cir. 1963), cert. denied 373 U. S. 936; 5 Moore, Federal Practice, ¶38.29 (2d ed. 1951); Borchard, Declaratory Judgments, pp. 238-239, 399-404 (2d ed. 1941); *Beaunit Mills, Inc.* v.

Since petitioner is unable to identify any legal issues in the present suit, he points to legal issues which *could* arise if plaintiffs sought damages in this or a later suit. Such a claim here is at best premature.[11] To grant it would be to destroy the constitutional principle that there is no right to jury trial in a purely equitable action, since a hypothetical legal issue arising in the future can always be postulated.

Therefore, petitioner's claim that he has a present right to a jury trial because hypothetical issues may arise in the future must fail.

Eday Fabric Sales Corp., 124 F. 2d 563 (2d Cir. 1942); *Inland Steel Products Co. v. MPH Manufacturing Corp.*, 25 F. R. D. 238 (N. D. Ill. 1959); *State Farm Mutual Automobile Ins. Co. v. Mossey*, 195 F. 2d 56 (7th Cir. 1952), cert. denied 344 U. S. 869.

[11] More probably, the claim is totally ungrounded. If the District Court granted precisely the declaration requested in the complaint, namely the declaration that the maintenance of school segregation is unconstitutional, it would afford no basis for a later finding that petitioner, as an individual, had subjected the plaintiffs to the deprivation of their constitutional rights in violation of 42 U. S. C. §1983.

Petitioner seems to agree (Petition, p. 15):

> As was pointed out to the Court of Appeals, it might well be that the two Boards, as legal entities, had violated plaintiffs' civil rights. However, this would not mean that each individual member of each Board had done so. Certainly, any member less than a majority might be completely innocent of a Board action taken by the majority. As was pointed out in the District Court, there is not one shred of evidence, not one admission, not one witness' testimony, which would establish that applicant, Taylor Robinson, has been guilty of any of the acts complained of.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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